Negotiating Around the Equal Pay Act: Use of the "Factor Other than Sex" Defense to Escape Liability

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I. INTRODUCTION

Women have struggled to achieve equality with men in American society. From being excluded from fundamental participation in America's democratic process to lacking access to higher education, American women have faced countless acts of marginalization.[1] Women have worked tirelessly to advance women's position and opportunities in American society, often through advocating for constitutional reform, such as the Nineteenth Amendment to the U.S. Constitution, which granted women the right to vote, and legislative reform, such as Title IX, aimed to remedy challenges for women in education.[2]

Advancing rights for women in the workplace has been a yet further complicated issue for women's rights advocates due to the significant influence of corporations in the American political system.[3] As such, legislators are often forced to craft narrow legislation fraught with loopholes, even if the legislation is intended to address a widespread, pervasive problem in American society; often, due to the passage of time, these limited statutes become insufficient to provide remedies for the issues they aimed to address.[4]

Such was the case with the Equal Pay Act of 1963. Congress enacted the Equal Pay Act in 1963 in order to address the substantial pay gap between men and women in the American workplace.[5] In 1963, women made approximately 58.9 cents for every dollar a man made, indicating a wage gap of 41.1% when

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[1] *See* Part V.A (discussing barriers women face in the workplace context alone).

[2] *See The Fight for Women's Suffrage*, HIST. CHANNEL (2009), http://www.history.com/topics/womens-history/the-fight-for-womens-suffrage [https://perma.cc/XF5C-QWAT] (discussing the women's suffrage movement and passage of the Nineteenth Amendment); *Overview of Title IX of the Education Amendments of 1972*, U.S. DEP'T JUST., http://www.justice.gov/crt/overview-title-ix-education-amendments-1972-20-usc-1681-et-seq [https://perma.cc/ZZM7-9RS8] (last updated Aug. 7, 2015) (providing information about Title IX).

[3] Lee Drutman, *How Corporate Lobbyists Conquered American Democracy*, ATLANTIC (Apr. 20, 2015), http://www.theatlantic.com/business/archive/2015/04/how-corporate-lobbyists-conquered-american-democracy/390822/ [https://perma.cc/LP6Q-CHBQ] (discussing the influence of corporations on the American political system).

[4] David John Marotta, *What Is Rent-Seeking Behavior?*, FORBES (Feb. 24, 2013), http://www.forbes.com/sites/davidmarotta/2013/02/24/what-is-rent-seeking-behavior/#3d84469a7f24 [https://perma.cc/8W5H-VTN3] (discussing the influence of rent-seeking in legislation).

[5] Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974) ("Congress' purpose in enacting the Equal Pay Act was to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry . . . .").

the Equal Pay Act was signed into law.[6] For women of color, the wage gap was more substantial, with black women earning only 43.2 cents for every dollar earned by a white male in 1967—the earliest year for which data is available.[7]

Conditions for American women in the workplace have improved, but the wage gap remains substantial. In 2010, women earned 77.4 cents per dollar earned by men,[8] and in 2013, women earned 78% of what men earned.[9] In historically male-dominated fields, the wage gap widens more significantly, with women earning 67% of men's earnings in the field of natural resources, construction, and maintenance and 71% in the field of police and sheriff's patrol officers.[10]

As the wage gap between men and women continues to persist in a meaningful way more than fifty years after the enactment of the Equal Pay Act, it is necessary to evaluate the ways in which the legislation has provided access to the remedies it intended and the ways in which the Act has fallen short. One of the most significant shortcomings of the Equal Pay Act has been the interpretation of its affirmative defenses for employers.[11]

Although the Equal Pay Act was passed with the intention of eradicating the pay gap between American men and women, its ability to provide legal recourse for those who experience wage discrimination has been significantly limited by the courts' interpretation of the "factor other than sex" defense provided in the statute.[12] Courts have allowed employers to escape liability by construing inherently gendered factors of employment, such as negotiating for pay and benefits, as "factors other than sex," consequently limiting women's potential for a legal remedy under the Equal Pay Act.[13]

This Note examines the current status of Equal Pay Act litigation and the application of the "factor other than sex" defense to an inherently gendered practice: negotiations in the workplace. Part II describes the pay gap as it was in 1963 and still exists today in order to evidence the continuing need for a

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[6] Abby Lane & Katherine Gallagher Robbins, *The Wage Gap Over Time*, NAT'L WOMEN'S L. CTR. (May 3, 2012), http://nwlc.org/wage-gap-over-time/ [https://perma.cc/DZ7X-SXXJ].

[7] *Id.*

[8] *Id.*

[9] WOMEN'S BUREAU, U.S. DEP'T OF LABOR, EQUAL PAY, http://www.dol.gov/sites/default/files/documents/featured/equalpay/equalpay-78cents.pdf [https://perma.cc/5JZR-T7ER].

[10] *Id.*

[11] *See* Equal Pay Act, 29 U.S.C. § 206(d)(1) (2012). The Equal Pay Act provides four statutory affirmative defenses for employers. The fourth affirmative defense, "any other factor other than sex," has created many issues with the Equal Pay Act's enforcement. *Id.*

[12] Christine Elzer, *Wheeling, Dealing, and the Glass Ceiling: Why the Gender Difference in Salary Negotiation Is Not a ''Factor Other than Sex'' Under the Equal Pay Act*, 10 GEO. J. GENDER & L. 1, 10–19 (2009) (discussing the ways in which the courts have interpreted negotiation as a factor other than sex).

[13] *Id.*

legal remedy under the Equal Pay Act. Part III discusses the text of the Equal Pay Act and how it has been interpreted by the courts. Part IV addresses the "factor other than sex" defense and how it has been applied in the courts. Part V discusses the impact of negotiation in the workplace, particularly in relation to decisions about pay and opportunities for promotion, which inherently affect an employee's pay. This Part also addresses the social science research that indicates that salary negotiation has different effects and outcomes for men and women, whether intended or not. Part V then focuses on the problems associated with construing negotiation as a factor other than sex and the ineffectiveness of previously proposed solutions. This Part also proposes legislation to remove the possibility of construing negotiation as a factor other than sex for the purposes of the Equal Pay Act.

II. THE GENDER PAY GAP: THEN AND NOW

Congress enacted the Equal Pay Act of 1963 in an effort to eradicate pay discrimination based on gender.[14] This discrepancy in pay based on the gender of an employee is often referred to as the pay gap or wage gap.[15] Most often, the difference in wage is expressed in one of two ways. The first, median earnings, is expressed in the percentage disparity between men's median income and women's median income; this is a numerical representation of the pay gap itself.[16] The second numerical means of stating the disparity in pay is through an earnings ratio, which evaluates women's earnings as a percentage of men's earnings.[17] The earnings ratio is the most common expression of the "pay gap," even though it represents a ratio rather than the pay gap itself.[18] The common expression of the pay disparity between American men and American women is often the statement of women making so many cents for

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[14] Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974).

[15] ROSA CHO & ABAGAIL KRAMER, INT'L CTR. FOR RESEARCH ON WOMEN, EVERYTHING YOU NEED TO KNOW ABOUT THE EQUAL PAY ACT 6–7, http://www.icrw.org/wp-content/uploads/2016/11/Everything-You-Need-to-Know-about-the-Equal-Pay-Act.pdf [https://perma.cc/467T-ZZEY] (discussing the various means and methods of calculating the pay gap).

[16] *Id.* at 6. The equation used to calculate this means of expressing the pay gap is dividing the difference between men's and women's median earnings by men's median earnings (Pay gap = (men's median earnings - women's median earnings) / men's median earnings). *Id.* For example, if men's and women's median earnings were $48,202 and $37,118, respectively, the pay gap would be stated as 23%. *Id.*

[17] *Id.* The earnings ratio is calculated by dividing women's earnings by men's earnings (Earnings ratio = women's median earnings / men's median earnings). *Id.* For example, if men's and women's median earnings were $48,202 and $37,118, respectively, the pay gap would be stated as 77%. *Id.* at 6–7.

[18] Sarah Jane Glynn, *Explaining the Gender Wage Gap*, CTR. FOR AM. PROGRESS (May 19, 2014), https://www.americanprogress.org/issues/economy/reports/2014/05/19/90039/explaining-the-gender-wage-gap/ [https://perma.cc/XA76-N43W].

every dollar a man earns.[19] Though the pay gap is not as severe as it was when the Equal Pay Act was enacted in 1963, it still persists in the American workforce and has significant implications in women's lives.

A. *The Pay Gap in 1963*

When the Equal Pay Act became law in 1963, women made 58.9% of men's earnings, indicating a pay gap of 41.1%.[20] The pay gap had mostly grown in the years leading up to the passage of the Equal Pay Act with a 39.3% gap in 1960, a 40.8% gap in 1961, and a 40.7% gap in 1962.[21]

Pay inequity between men and women had been prevalent in the American economy since the advent of the nation itself, but traditionally so few women were in the American workforce that the concerns of unequal pay were not at the forefront of the American conscience.[22] During the early twentieth century, women accounted for less than 24% of the American workforce.[23] But World War I and World War II called away many men to service in the Armed Forces, and employers were forced to hire women into the positions left open during wartime that had been traditionally held by men.[24] During these times of war when women were working in historically male-dominated employment sectors, male workers and unions began to advocate for equal pay between men and women.[25] Their advocacy, however, was not based on notions of equality between the sexes but rather grew out of the fear that employers would choose to retain female workers after the men returned if companies could pay women a cheaper wage or dilute male workers' wage once they returned to the same positions.[26] In order to protect jobs and rate of pay for American men, it became necessary for women to be paid the same.[27]

This push for pay equity was encouraged in both the public and private sectors and garnered support from public officials, such as Secretary of Labor

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[19] *See, e.g.*, WOMEN'S BUREAU, *supra* note 9. In 2013, the Women's Bureau for the Department of Labor stated that women made 78 cents for every dollar a man makes. *Id.*

[20] Lane & Robbins, *supra* note 6.

[21] *Id.*

[22] *Equal Pay Act of 1963*, NAT'L PARK SERV., https://www.nps.gov/articles/equal-pay-act.htm [https://perma.cc/4VG4-UF92] (explaining the development of the equal pay movement).

[23] *Id.*

[24] Charlotte Alter, *Here's the History of the Battle for Equal Pay for American Women*, TIME (Apr. 14, 2015), http://time.com/3774661/equal-pay-history/ [https://perma.cc/DN9E-YHA8] (discussing the historical events and atmosphere that gave rise to the fight for equal pay).

[25] *Id.*

[26] *Id.*

[27] *Id.*; *Equal Pay Act of 1963*, *supra* note 22.

Lewis Schwellenbach.[28] As men began to return from the Wars and reenter the workforce, however, women were again expected to stay at home rather than work, and the push for an equal pay amendment was unsuccessful.[29]

National pay equity legislation was finally successful in 1963 when President John F. Kennedy signed the Equal Pay Act into law.[30] The Equal Pay Act required that men and women be paid equally, but federal law did not require equal treatment of the sexes in the workplace until the Civil Rights Act of 1964 was passed the following year.[31]

Following the passage of the Equal Pay Act, the pay gap began to slowly narrow, though there were some years in which the pay gap increased rather than decreased.[32] The pay gap reached its widest point in 1973, at which time the gap was 43.4%, meaning women were making less than 57 cents per every dollar made by their male counterparts.[33] In the years since 1973, the gap has again narrowed but has remained rather stagnant for the past decade.[34]

B. *The Pay Gap Today*

Although the pay gap has narrowed substantially since the Equal Pay Act became law, the pay gap has remained at approximately 23% for the past decade.[35] This data gave rise to the oft quoted statistic that a woman is paid 77 cents for every dollar a man makes.[36] Although this statistic is often cited in many discussions of pay inequality, the number is probably now at 79.6 cents rather 77.[37] It is currently estimated that, if current trends continue, women may not reach equality in pay until 2059.[38]

In an effort to raise awareness about pay inequality, the National Committee on Pay Equity (NCPE) started Equal Pay Day in 1996.[39] The day is intended to symbolize "how far into the year women must work to earn what

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[28] Alter, *supra* note 24. In support of an equal pay amendment, Schwellenbach, then-Secretary of Labor, stated, "There is no sex difference in the food she buys or the rent she pays, there should be none in her pay envelope." *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] Lane & Robbins, *supra* note 6. In 1966, 1967, 1968, 1972, 1973, 1974, and 1975, the pay gap was larger than it was at the time of the Equal Pay Act's enactment. *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *The Wage Gap over Time: In Real Dollars, Women See a Continuing Gap*, NAT'L COMMITTEE ON PAY EQUITY, http://www.pay-equity.org/info-time.html [https://perma.cc/FU9Z-7EHB] (last updated Sept. 2016).

[38] *Id.*

[39] *Equal Pay Day*, NAT'L COMMITTEE ON PAY EQUITY, http://www.pay-equity.org/day.html [https://perma.cc/PD38-CPEE] (discussing the creation of Equal Pay Day as a means to raise awareness about pay inequality).

men earned in the previous year."[40] The NCPE encourages those committed to achieving equal pay between men and women to wear red to "symbolize how far women and minorities are 'in the red' with their pay[.]"[41] Equal Pay Day has been endorsed by many prominent entities, such as the White House[42] and the National Women's Law Center,[43] in acknowledgment of the continued existence of the wage gap in the American workforce and its impact on women throughout the country.

Despite the efforts of many to raise awareness of, and concern for, the gender pay gap, many people still question its existence, impact, and severity.[44] Although the pay gap has been disputed for a number of reasons, ranging from an overstatement of the severity of the gap[45] to assertions that women are complaining without good reason,[46] many of the reasons offered in opposition to the *gendered* pay gap are related to gender themselves. For example, some of the most common responses to the pay gap are that women choose to stay home with children or pursue less high-stress—and thereby often higher-paying—careers in order to be able to spend more time with families.[47] These are constraints imposed on working wives and mothers

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[40] *Id.*

[41] *Id.*

[42] President Barack Obama, *Presidential Proclamation – National Equal Pay Day, 2015*, WHITE HOUSE (Apr. 13, 2015), https://www.whitehouse.gov/the-press-office/2015/04/13/presidential-proclamation-national-equal-pay-day-2015 [https://perma.cc/7WR7-QMHW]. President Obama has since made additional statements calling for the passage of legislation to address the continuing existence of the pay gap in America. *See infra* Part V.D.2.

[43] Lane & Robbins, *supra* note 6.

[44] *See* Matthew Cochran, *There Is No Wage Gap: Feminists Want Equal Pay for Unequal Work*, FEDERALIST (May 6, 2015), http://thefederalist.com/2015/05/06/there-is-no-wage-gap-feminists-want-equal-pay-for-unequal-work/ [https://perma.cc/VA8P-V4LA]; Glenn Kessler, *President Obama's Persistent '77-Cent' Claim on the Wage Gap Gets a New Pinocchio Rating*, WASH. POST (Apr. 9, 2014), https://www.washingtonpost.com/news/fact-checker/wp/2014/04/09/president-obamas-persistent-77-cent-claim-on-the-wage-gap-gets-a-new-pinocchio-rating/ [https://perma.cc/9L7T-MJ6X]; *see also* Mark J. Perry & Andrew G. Biggs, *The '77 Cents on the Dollar' Myth About Women's Pay*, WALL STREET J. (Apr. 7, 2014), http://www.wsj.com/articles/SB10001424052702303532704579483752909957472 [https://perma.cc/H9GV-CTUD]; Sabrina L. Schaeffer, *Pure Politics: Myth of Equal Pay Day*, CNN, http://www.cnn.com/2015/04/14/opinions/schaeffer-equal-pay-day/ [https://perma.cc/XU38-WHLF] (last updated Apr. 14, 2015).

[45] Kessler, *supra* note 44.

[46] Cochran, *supra* note 44.

[47] Eileen Patten, *On Equal Pay Day, Key Facts About the Gender Pay Gap*, PEW RES. CTR. (Apr. 14, 2015), http://www.pewresearch.org/fact-tank/2015/04/14/on-equal-pay-day-everything-you-need-to-know-about-the-gender-pay-gap/ [https://perma.cc/8KVY-GFZJ]. This catch-22 for working mothers is commonly referred to as the difficulties of women trying to ''have it all.'' *See* Anne-Marie Slaughter, *Why Women Still Can't Have It All*, ATLANTIC (July/Aug. 2012), http://www.theatlantic.com/magazine/archive/2012/07/why-women-still-cant-have-it-all/309020/ [https://perma.cc/DJX9-79AK] (arguing that women still cannot "have it all").

because they are women and are less pervasive in the lives, and salaries, of working husbands and fathers.[48] Regardless of its criticisms or rationales, the data indicates that the gender pay gap still exists in the American workforce and has a great effect on women's lives.[49] In light of this persistence of pay inequality, it is necessary to consider the ways in which the Equal Pay Act has or has not been successful in its purpose of remedying the pay disparities between men and women.[50]

III. THE EQUAL PAY ACT'S EFFECTIVENESS

The Equal Pay Act was enacted in 1963 with the hopes of providing a remedy for gendered pay inequity to American employees in both the public and private sector.[51] The purpose of the legislation was to assure that "those who perform tasks which are determined to be equal shall be paid equal wages."[52] The Senate aimed to dispel the antiquated notion that because of their role in society, men deserved to be paid more than women.[53] As the pay gap continues to exist in a meaningful way, the Equal Pay Act has fallen short of its intended purpose. In light of the shortcomings of the Equal Pay Act,[54] it is necessary to consider the ways in which courts' interpretations of the Equal Pay Act have contributed to its inability to fully eradicate pay discrimination.

A. *The Equal Pay Act*

The Equal Pay Act was passed in 1963 as an amendment to the Fair Labor Standards Act.[55] The Fair Labor Standards Act applies to both private and public employers and provides standards for the payment of wages, such as minimum wage, overtime pay, and child labor.[56] As the Equal Pay Act focused on discrimination in pay, its addition to the Fair Labor Standards Act as an amendment was a logical fit.[57]

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[48] *The Gender Pay Gap – Myth vs. Fact*, NAT'L ORG. FOR WOMEN, http://now.org/resource/the-gender-pay-gap-myth-vs-fact/ [https://perma.cc/F6WZ-YT74] (discussing the implication on pay for working mothers).

[49] WOMEN'S BUREAU, *supra* note 9.

[50] *See* Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974).

[51] The Equal Pay Act amended the Fair Labor Standards Act, under which employees can recover from both public and private employers. H.R. REP. NO. 88-309 (1963).

[52] S. REP. NO. 88-176 (1963).

[53] *Id.*

[54] Peter Avery, Note, *The Diluted Equal Pay Act: How Was It Broken? How Can It Be Fixed?*, 56 RUTGERS L. REV. 849, 850 (2004).

[55] *See* Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206 (2012)).

[56] 29 U.S.C. § 206.

[57] *See* S. REP. NO. 88-176.

The text of the Equal Pay Act of 1963 forbids pay discrimination on the basis of sex and provides four defenses for employers.[58] The provision on discrimination in pay goes on to include specific considerations when a case implicates a labor organization.[59] The statute additionally provides that those who violate the Equal Pay Act are liable for the unpaid wages as dictated by the main text of the Fair Labor Standards Act.[60]

Although the requirement of a comparator or "substantial equality" between two positions has posed issues for plaintiffs pursuing Equal Pay Act claims,[61] many of the limitations of the Equal Pay Act have been the result of the affirmative defenses[62] enumerated in the statute itself and the interpretation of those defenses by the courts.[63] The "factor other than sex" defense has created great difficulties for plaintiffs alleging wage discrimination under the Equal Pay Act.[64]

B. *Early Interpretation by the Courts*

Cases involving the interpretation of the Equal Pay Act made their way up through the federal court system relatively quickly. One of the earliest, and most noteworthy, cases of the Equal Pay Act's jurisprudence came only seven years after the legislation was signed into law.[65] In 1970, the Third Circuit decided *Shultz v. Wheaton Glass Co.* and began shaping the interpretation of

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[58] 29 U.S.C. § 206(d)(1) ("No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.").

[59] *Id.* § 206(d)(2), (4).

[60] *Id.* § 206(d)(3).

[61] Mayer G. Freed & Daniel D. Polsby, *Comparable Worth in the Equal Pay Act*, 51 U. CHI. L. REV. 1078, 1080–81 (1984).

[62] The statute provides for four affirmative defenses: "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." 29 U.S.C. § 206(d)(1).

[63] Deborah Thompson Eisenberg, *Stopped at the Starting Gate: The Overuse of Summary Judgment in Equal Pay Cases*, 57 N.Y.L. SCH. L. REV. 815, 817 (2012/2013) (discussing the impact of the Equal Pay Act's affirmative defenses on plaintiffs' lack of success at the summary judgment stage).

[64] Ellen M. Bowden, *Closing the Pay Gap: Redefining the Equal Pay Act's Fourth Affirmative Defense*, 27 COLUM. J.L. & SOC. PROBS. 225, 226 (1994).

[65] *See generally* Shultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir. 1970).

the Equal Pay Act as it is known today. In *Shultz*, the Third Circuit reversed a district court ruling for the defendant, and in doing so held for the Secretary of Labor, who was advocating for the payment of back wages to female employees who had been paid less than their male counterparts.[66] The court found that the male and female employees performed equal work and deserved equal pay, and that the 10% wage discrepancy was based on gender.[67] The Third Circuit found that the employer did not carry its burden of proving that its pay disparity was based on a factor other than sex, as there was no evidence of the "economic value" of the male labor sufficient to justify the difference in pay.[68] Though certainly not a radical decision by current standards, it represented a major victory under the Equal Pay Act in line with Congress's purpose to be "a broad charter of women's rights in the economic field."[69]

It was not long after the passage of the Equal Pay Act that cases involving the interpretation of the statute made their way up to the Supreme Court of the United States.[70] In 1974, the Supreme Court decided *Corning Glass Works v. Brennan* and held for the Secretary of Labor.[71] In an opinion by Justice Marshall, the Court found a violation of the Equal Pay Act to have occurred when the employer paid female daytime inspectors a lower base wage than male nighttime inspectors.[72] The employer had not met its burden to prove that the pay differential was based on a factor other than sex.[73] The Court found that working the night shift was not a "working condition[]" sufficient to satisfy the affirmative defense and therefore was not a justifiable reason to pay men and women differently.[74] The Court also made a strong statement of Congress's purpose in passing the Equal Pay Act, stating that "Congress' purpose in enacting the Equal Pay Act was to remedy what was perceived to be a serious and endemic problem of employment discrimination."[75] The Court's decision expressed a willingness to follow the intent of Congress in passing pay equity legislation through a narrow reading of the affirmative defenses provided in the statute.[76]

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[66] *Id.* at 266–67.

[67] *Id.* at 264.

[68] *Id.* at 266–67.

[69] *Id.* at 265. The Third Circuit elaborated on this purpose: "It sought to overcome the age-old belief in women's inferiority and to eliminate the depressing effects on living standards of reduced wages for female workers and the economic and social consequences which flow from it." *Id.*

[70] *See generally* Corning Glass Works v. Brennan, 417 U.S. 188 (1974).

[71] *Id.* at 209–10.

[72] *Id.* at 190–91.

[73] *Id.* at 196–97.

[74] *Id.* at 202–04.

[75] *Id.* at 195. The Court additionally discussed Congress's intent to eradicate wage structures based on "outmoded" beliefs that men should be paid more because of the male role in society. *Id.* (quoting S. REP. NO. 88-176 (1963)).

[76] *Corning Glass Works*, 417 U.S. at 196–97 (holding that the different working conditions between the day and night shift were not a factor other than sex).

In 1988, the Sixth Circuit ruled on a case that evidenced both the courts' early willingness to enforce the Equal Pay Act and the later reluctance to find employers liable for pay discrimination.[77] The court left open the possibility that the disparate impact framework could be applicable to Equal Pay Act claims but held that J.C. Penney's "head of household" rule for awarding fringe benefits to its employees was a factor other than sex and justified a disparity in pay.[78] This case presented an early indication of the shift in the courts toward a broader reading of the "factor other than sex" defense, which in turn limited liability for employers under the Equal Pay Act.

The early decisions in the federal courts evidence the willingness of the courts to interpret the Equal Pay Act in accordance with Congress's intent in passing the legislation,[79] which early on included reading the affirmative defenses narrowly to encompass only true nongender-based reasons for an existing pay differential. The current interpretation in the courts, as foreshadowed by *Equal Employment Opportunity Commission v. J.C. Penney Co.*, looks quite different from the early willingness to provide a true remedy to victims of pay discrimination.[80]

C. *Current Interpretation of the EPA by the Courts*

Courts in recent years have backed away from the more expansive reading of the Equal Pay Act that was dominant in the years immediately following its enactment.[81] Plaintiffs have had difficulty overcoming summary judgment in Equal Pay Act cases in the past decade or so and even more difficulty winning them.[82]

In order to bring a successful Equal Pay Act claim, plaintiffs must first present evidence that a coworker of the opposite sex is paid more and that their positions are "substantially equal."[83] This requirement derives from the comparator requirement in the text of the Equal Pay Act.[84] Courts vary in their

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[77] *See* Equal Employment Opportunity Comm'n v. J.C. Penney Co., 843 F.2d 249, 254 (6th Cir. 1988).

[78] *Id.* at 252.

[79] *See* Part III.B.

[80] Eisenberg, *supra* note 63, at 816–17; *see also* Avery, *supra* note 54, at 850.

[81] *See* Avery, *supra* note 54, at 850.

[82] Eisenberg, *supra* note 63, at 817.

[83] Edwards v. Fulton County, 509 F. App'x 882, 886 (11th Cir. 2013) (per curiam) ("[T]he plaintiff need not show that his position and the comparator's are identical but rather that the two positions are 'substantially equal.'" (quoting Arrington v. Cobb County, 139 F.3d 865, 876 (11th Cir. 1998))); Beck–Wilson v. Principi, 441 F.3d 353, 362 (6th Cir. 2006) ("In determining whether a comparator is appropriate for the purposes of an EPA claim, our focus is on actual job requirements and duties, rather than job classifications or titles.").

[84] 29 U.S.C. § 206(d)(1) (2012) ("No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such

application of the "substantially equal" element of the Equal Pay Act's prima facie case, some requiring essentially identical positions.[85]

Though "substantially equal" positions are required to successfully bring an Equal Pay Act claim, the positions do not always have to have the same title.[86] In *Beck–Wilson v. Principi*, the Sixth Circuit held that a nurse practitioner and a physician assistant were capable of being substantially equal positions even though they had different job titles.[87] The circuit court reversed the district court's grant of summary judgment for the employer.[88]

In most cases, however, courts are more willing to uphold grants of summary judgment due to an employee's failure to meet the court's substantial equality standard.[89] To allege a prima facie case under the Equal Pay Act and meet the substantial equality requirement, a plaintiff must prove: 1) the employer pays a member of the opposite sex a different wage; 2) the plaintiff and the member of the opposite sex perform equal work; and 3) the working conditions under which the jobs are performed are similar.[90] To prove the second factor—that the positions are substantially equal—the "plaintiff must establish that the jobs compared entail common duties or content, and do not simply overlap in titles or classifications."[91] In *Equal Employment Opportunity Commission v. Port Authority*, the Second Circuit held that the Equal Employment Opportunity Commission (EEOC) had not sufficiently presented facts to show that male and female nonsupervisory attorneys at the Port Authority held "substantially equal" positions.[92] In short, despite using similar "evaluative criteria" and having the same job code for both male and female nonsupervisory attorneys, the court found that the positions were not "substantially equal" because the EEOC had discussed the job duties of attorneys broadly and without reference to the specific work of these attorneys.[93]

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establishment *for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions* . . . ." (emphasis added)).

[85] Deborah Thompson Eisenberg, *Shattering the Equal Pay Act's Glass Ceiling*, 63 SMU L. REV. 17, 37–46 (2010). In a later article, Eisenberg discusses the high number of Equal Pay Act cases that are dismissed on summary judgment. Eisenberg, *supra* note 63, at 832–33. She, in part, attributes this trend to the strict requirements for proving "substantially equal." *Id.*

[86] *See Beck–Wilson*, 441 F.3d at 361.

[87] *Id.*

[88] *Id.* at 356.

[89] *See* Eisenberg, *supra* note 85, at 17.

[90] Equal Employment Opportunity Comm'n v. Port Auth., 768 F.3d 247, 254–55 (2d Cir. 2014).

[91] *Id.* at 255.

[92] *Id.* at 258 ("Simply put, the EEOC has not alleged a single nonconclusory fact supporting its assertion that the claimants' and comparators' jobs required 'substantially equal' skill and effort.").

[93] *Id.*

As evidenced above, it is hard to predict what positions a court will find "substantially equal." Courts can find substantial equality when the job titles are different[94] but not find substantial equality between male and female employees with the same job code.[95] Due to the uncertainty in the Equal Pay Act's prima facie case, many cases turn on the application of the affirmative defenses, mainly the Equal Pay Act's "factor other than sex" defense, which has been interpreted inconsistently in the courts.[96]

IV. FACTOR OTHER THAN SEX AS A DEFENSE

The Equal Pay Act provides for four statutory affirmative defenses: a pay system based on seniority, a merit-based system, a pay system based on quality of production or quantity, or a pay "differential based on any other factor other than sex."[97] The first three defenses refer to systems that base an individual's pay on an established evaluative system. The "factor other than sex" defense, however, is a catchall defense without much specificity as to its application provided in the statutory language.[98] Due to the lack of detail in the statute, the courts have inconsistently applied the defense, leading to confusion for both employers and employees.[99] Often, this confusion and inconsistency has led to success for employers in asserting the defense and defeat for employees seeking to assert Equal Pay Act claims.[100]

As mentioned above, the "factor other than sex" defense has come to play a pivotal role, in part due to the inconsistent requirements of the Equal Pay Act's prima facie case.[101] After an employee has made her prima facie case, the employer is then afforded the opportunity to raise one of the Equal Pay Act's affirmative defenses.[102] Due to the wide scope of the "factor other than sex" defense and the discretionary nature of many employment decisions, the

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[94] *E.g.*, Beck–Wilson v. Principi, 441 F.3d 353, 361 (6th Cir. 2006).

[95] *E.g.*, *Port Auth.*, 768 F.3d at 258.

[96] *See* Bowden, *supra* note 64, at 226.

[97] 29 U.S.C. § 206(d)(1) (2012) ("No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex . . . except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex . . . .").

[98] The statute itself only states that the differential falls under the exception if it is based on "any factor other than sex." *Id.*

[99] Bowden, *supra* note 64, at 226, 233–34.

[100] *See id.*

[101] *See generally id.* (discussing various situations where employers used the courts' inconsistent application of the "factor other than sex" defense to defeat EPA claims). For further discussion, see *supra* Part III.C.

[102] Riser v. QEP Energy, 776 F.3d 1191, 1198 (10th Cir. 2015) ("Once a plaintiff has established a prima facie case of discrimination under the EPA, the defendant must show the pay disparity was justified by one of four permissible reasons . . . .").

Equal Pay Act's fourth affirmative defense is invoked by employers quite frequently.[103]

A. *Interpretation in the Courts*

The "factor other than sex" defense has been interpreted to be a catchall defense for employers.[104] Some courts have focused on the use of the word "any" in the statutory language and have held that even "[r]andom" pay decisions can be justified as a factor other than sex.[105] Other courts require the employer to articulate a "legitimate business reason."[106] The "factor other than sex" defense is most commonly used to justify pay disparities based on: an informal seniority system, qualifications of the plaintiff (for example, education, performance, or experience), "'market forces' or business judgment," and prior or negotiated salaries.[107]

When asserting the "factor other than sex" defense, the employer bears the burden of production and persuasion, because it is an affirmative defense.[108] As such, the employer is required to "prove, and not just assert" that the pay differential was the result of a factor other than sex.[109] In *King v. Acosta Sales*, the Seventh Circuit, which has held that even a "random" factor can qualify as a factor other than sex, reversed a grant of summary judgment for an employer when an employer did not sufficiently justify both initial pay disparities as well as unequal salary raises based allegedly on employees' education level.[110]

Though the Seventh Circuit reversed a grant of summary judgment involving education as a factor other than sex in *King v. Acosta Sales & Marketing, Inc.*, differences in experience and education are frequently considered acceptable factors other than sex.[111] The rationale is often stated as allowing employers to "reward" additional experience or education for someone in the same position.[112] This use of the "factor other than sex" defense is closely related to the "market forces" application of the "factor other than sex" defense, which allows employers to base pay off of "legitimate

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[103] Eisenberg, *supra* note 63, at 836 (stating that nearly half of the claims analyzed asserted the "factor other than sex" defense).

[104] *See* Bowden, *supra* note 64, at 226.

[105] *E.g.*, King v. Acosta Sales & Mktg., Inc., 678 F.3d 470, 475 (7th Cir. 2012) ("Random decision is a factor other than sex.").

[106] *E.g.*, Beck–Wilson v. Principi, 441 F.3d 353, 365–66 (6th Cir. 2006) (quoting Equal Employment Opportunity Comm'n v. J.C. Penney Co., 843 F.2d 249, 253 (6th Cir. 1988)).

[107] Eisenberg, *supra* note 63, at 819.

[108] *King*, 678 F.3d at 474.

[109] *Id.*

[110] *Id.* at 474–75.

[111] *See* Bowden, *supra* note 64, at 243.

[112] *E.g.*, Merillat v. Metal Spinners, Inc., 470 F.3d 685, 697 (7th Cir. 2006) (quoting Stanley v. Univ. of S. Cal., 13 F.3d 1313, 1322 (9th Cir. 1994)).

market forces."[113] These "forces" often include consideration of what the market rate for a particular position would be or the assumed market rate for an employee of certain experience or education level.[114]

Consideration of experience, education, and market forces often go hand in hand with another common type of factor other than sex justification: prior salary.[115] Although some courts require that a factor other than sex relate to a legitimate business reason—including use of prior salary in determining pay—not all courts follow this approach.[116] In those circuits, use of prior salary is acceptable even if it is not related to the position at issue or business related.[117] If discrimination was suspected in the prior salary in a circuit without the legitimate business reason rule, that wage disparity, as well as the current disparity at issue, must be proven to have occurred because of the employee's sex in order for the prior salary not to be an acceptable factor other than sex.[118]

Although the broad reading of the "factor other than sex" defense can be justified by the inclusion of the word "any" in the statute,[119] this interpretation has created a large loophole through which employers can escape liability to their employees and has caused a split among the circuit courts.[120]

B. *Requirement that a Factor Other than Sex Be Nongendered (Bona Fide)*

In order for an employer's justification to be considered a factor other than sex sufficient to avoid liability, the justification must be bona fide.[121] This requirement has been articulated by the Supreme Court of the United States

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[113] *Id.* (quoting in part Stopka v. All. of Am. Insurers, 141 F.3d 681, 687 (7th Cir. 1998)).

[114] *See id.* (first citing *Stanley*, 13 F.3d at 1322; and then citing Cullen v. Ind. Univ. Bd. of Trs., 338 F.3d 693, 703 (7th Cir. 2003)).

[115] *See* Bowden, *supra* note 64, at 241.

[116] *See, e.g.*, Wernsing v. Dep't of Human Servs., 427 F.3d 466, 470 (7th Cir. 2005) (reiterating the Seventh Circuit's rejection of the legitimate business reason requirement and advocating for its position); Jeffrey K. Brown, Note, *Crossing the Line: The Second, Sixth, Ninth, and Eleventh Circuits' Misapplication of the Equal Pay Act's "Any Other Factor Other Than Sex" Defense*, 13 HOFSTRA LAB. L.J. 181, 184 (1995).

[117] *E.g.*, *Wernsing*, 427 F.3d at 470 (reiterating the Seventh Circuit's rejection of the legitimate business reason requirement).

[118] *E.g.*, *id.*

[119] 29 U.S.C. § 206(d)(1) (2012) (allowing gender pay differentials where such differentials are, *inter alia*, "based on *any* other factor" besides sex (emphasis added)).

[120] Bowden, *supra* note 64, at 226 ("Certain courts have read the defense broadly as sanctioning any wage differential not overtly based on gender. Indeed, the ambiguous language of the fourth affirmative defense has prompted fears that it would permit limitless loopholes to the Act." (footnote omitted)). *But see* Brown, *supra* note 116, at 184 (stating that the "factor other than sex" defense should be interpreted broadly to follow the statute's "plain meaning" rather than the legislative intent).

[121] Bowden, *supra* note 64, at 248–49.

and exists regardless of whether a circuit has adopted the additional legitimate business reason rule.[122]

As the Equal Pay Act was enacted in order to eliminate sex-based wage differentials,[123] when an employer asserts the "factor other than sex" defense, the practice or program it is defending must be "more than an honest effort" and "must have substance and significance."[124] In *Hodgson v. Behrens Drug Co.*, the Fifth Circuit held that though Behrens's training program was neither "illusory" nor a "post-event justification" for its unequal pay, the company had still violated the Equal Pay Act as there was no definitive end point to the program and no woman had ever been a part of the program.[125]

The bona fide requirement has been interpreted by the Supreme Court to mean "not . . . on the basis of sex."[126] The Supreme Court discussed the Equal Pay Act's affirmative defenses at length in *Washington County v. Gunther*, a case involving the Bennett Amendment to Title VII.[127] The Court acknowledged that the Equal Pay Act's fourth affirmative defense was intended to apply to bona fide factors other than sex when used to make decisions about employees' wages.[128] The legislative intent in adding the "factor other than sex" defense was to encompass bona fide factors as long as they do not discriminate on the basis of sex.[129]

These two cases, when taken together, establish that the bona fide requirement, as applied to the "factor other than sex" defense, requires a narrow reading of the statutory defense. A bona fide factor other than sex cannot be based on sex,[130] must consist of more than just an "honest effort,"[131] and requires an explanation by the employer beyond merely a nonillusory intention or a justification that is simply not created post-event.[132] This definition of a bona fide factor other than sex is consistent with Congress's

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[122] Washington County v. Gunther, 452 U.S. 161, 171 (1981).

[123] Hodgson v. Behrens Drug Co., 475 F.2d 1041, 1047 (5th Cir. 1973) ("The Equal Pay Act clearly mandates the demise of sex-based wage differences except in special, narrow circumstances.").

[124] *Id.* at 1047–48 (discussing the "factor other than sex" defense in relation to a training program).

[125] *Id.* at 1047. The training program at issue had never included any women, and completion of the program was based on personnel needs. *Id.* The Fifth Circuit found these two characteristics to be fatal for the employer as they indicated that the training program was not bona fide. *Id.*

[126] *Gunther*, 452 U.S. at 171.

[127] *See generally id.* Though it was not a case alleging a violation of the Equal Pay Act, the Bennett Amendment incorporates the Equal Pay Act's affirmative defenses into the statutory scheme of a pay discrimination claim under Title VII. *See id.* at 170–71.

[128] *Id.* at 170.

[129] *Id.* at 170–71.

[130] *Id.*

[131] Hodgson v. Behrens Drug Co., 475 F.2d 1041, 1047–48 (5th Cir. 1973).

[132] *Id.* at 1047.

intent for the Equal Pay Act's fourth affirmative defense to be narrow in scope.[133]

C. *Negotiation as a Factor Other than Sex in the Courts*

Though there have not been many cases directly considering whether negotiation is a factor other than sex, many cases have alluded to plaintiffs' inability to recover when their pay disparity is due to a salary negotiation, and recently one court held that negotiations could be a factor other than sex, but only when the opportunity to negotiate was offered to men but not women.[134]

A recent district court case provides, perhaps, the strongest treatment of salary negotiation under the Equal Pay Act.[135] In *Dreves v. Hudson Group (HG) Retail, LLC*, the plaintiff brought a claim under the Equal Pay Act when her successor in her position, a male, was paid more than she was.[136] Her employer attributed this pay disparity to the male employee's superior negotiation skills.[137] The court rejected this argument, stating that there was "no basis" for allowing negotiation to qualify as a factor other than sex sufficient to justify the entire pay disparity.[138] The court considered this employer's attempted line of argument indistinguishable from the arguments that justified higher salaries for men at the enactment of the Equal Pay Act itself.[139]

This view has not been widely accepted, however. When the Fifth Circuit was faced with a case involving salary negotiations under the Equal Pay Act approximately one year after *Dreves*, its holding was much narrower than that of the *Dreves* court. In *Thibodeaux–Woody v. Houston Community College*, the plaintiff and her male counterpart were given different rules regarding negotiation: the woman was told she could not negotiate, and her male counterpart's negotiations were considered.[140] The Fifth Circuit reversed the district court's grant of summary judgment on the plaintiff's Equal Pay Act claim, stating that "[a] practice is not a bona fide 'factor other than sex' if it is discriminatorily applied."[141] The court based its ruling not on the use of the

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[133] *See Gunther*, 452 U.S. at 171; *Hodgson*, 475 F.2d at 1047.

[134] Thibodeaux–Woody v. Hous. Cmty. Coll., 593 F. App'x 280, 284–85 (5th Cir. 2014).

[135] Dreves v. Hudson Grp. (HG) Retail, LLC, No. 2:11-CV-4, 2013 WL 2634429, at *8 (D. Vt. June 12, 2013).

[136] *Id.* at *1.

[137] *Id.* at *8.

[138] *Id.* ("[T]here is simply no basis for the proposition that a male comparator's ability to negotiate a higher salary is a legitimate business-related justification to pay a woman less.").

[139] *Id.* ("Permitting an employer to defend itself simply by showing that a disparity was the product of one negotiation with a male employee would lead to the same result: a marketplace that values the work of men and women differently.").

[140] Thibodeaux–Woody v. Hous. Cmty. Coll., 593 F. App'x 280, 282 (5th Cir. 2014).

[141] *Id.* at 284.

negotiation as a factor other than sex but on the way in which negotiation was differently applied between genders.[142] Presumably, if the employer could show that the negotiation policy was applied fairly, it would have been a legitimate factor other than sex.[143]

Other district courts have similarly not followed the approach of the *Dreves* court. The District Court for the District of Arizona explicitly "distinguish[ed]" *Dreves* on a factual basis from the case before the court and indicated that salary negotiation could be successfully alleged as a factor other than sex.[144] In *Muriel v. SCI Arizona Funeral Services, Inc.*, the court read the *Dreves* decision as turning on the fact that Dreves's successor was initially offered more than Dreves's salary at the end of her employment.[145] The court in *Muriel* additionally held that salary negotiations resulting in higher pay for a male employee than that of a female employee are not based on gender for the purposes of the Equal Pay Act.[146]

V. ASSURING THAT NEGOTIATION IS NOT A BONA FIDE FACTOR OTHER THAN SEX: AN AMENDMENT TO THE EQUAL PAY ACT

As shown above, the application of the "factor other than sex" defense has been anything but predictable.[147] It has caused a great deal of confusion for employers and employees alike, caused a split among the circuits, and led to an increasing number of Equal Pay Act claims being dismissed on summary judgment.[148] When applied to the use of salary negotiations, however, the "factor other than sex" defense creates even more complications, including the continued existence of the pay gap between genders and a lack of legal recourse for women whose income has been negatively affected by the practice. As the use of salary negotiations to determine pay is a common practice in the workplace,[149] its effect on American women is severe.

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[142] *Id.*

[143] *Id.* at 285 (finding an issue of material fact as to the application of the negotiation policy).

[144] Muriel v. SCI Ariz. Funeral Servs., Inc., No. CV-14-08160-PCT-DLR, 2015 WL 6591778, at *3 (D. Ariz. Oct. 30, 2015).

[145] *Id.*

[146] *Id.* ("The fact that Beavers successfully negotiated a higher salary does not indicate that Plaintiff's gender resulted in her receiving a lower salary for the same job. Accordingly, because negotiations and prior salary reasonably explain the pay difference, a jury could not find that the discrepancy in salary was based on Plaintiff's gender." (footnote omitted)). The court additionally noted that Muriel had never "attempted to negotiate." *Id.* at *3 n.2.

[147] *See supra* Part IV.

[148] *See supra* Part IV.

[149] Yuki Noguchi, *Some Companies Fight Pay Gap by Eliminating Salary Negotiations*, NPR (Apr. 23, 2015), http://www.npr.org/2015/04/23/401468571/some-companies-fight-pay-gap-by-eliminating-salary-negotiations [https://perma.cc/P96K-Y5MJ].

A. *Negotiation in the Workplace*

Negotiation is used by employers both large and small to determine the workers' base wages and wage increases.[150] In these negotiations, studies show that men are more assertive and four times more likely than women to negotiate their pay, according to economics professor Linda Babcock.[151] The impact of negotiation on women has led some companies to forgo salary negotiations with new hires.[152] Many companies, however, use negotiations as a primary means of determining an employee's pay.[153]

Due to the stereotypes imposed upon women in the workplace, ranging from the way in which assertive behaviors are perceived to opinions about what kinds of positions women are qualified to hold, salary negotiations present difficult challenges for women, often resulting in a lower wage than their male counterparts.[154]

Salary negotiations have become a critical part of the American workplace.[155] From fast food jobs for which applications require applicants to list a requested salary to formal salary negotiations for white-collar positions, negotiations have become one of the largest determining factors of an American worker's pay.[156] Though some companies, like Reddit, have eliminated the use of negotiations in determining salary, most companies still rely heavily on the practice.[157] Even in companies looking to increase the number of women in their workforce and in high positions, the use of salary negotiations still stifles their female employees' pay.[158]

Social science data from a number of researchers and institutions has determined that women are perceived differently than men when it comes to salary negotiations in the workplace.[159] This difference in perception has been considered by many to play a significant role in the persistence of the gender pay gap in the American workplace.[160] In terms of salary negotiations, a

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[150] *See id.*

[151] *Id.*

[152] *Id.*

[153] *See* Editorial, *Negotiating the Wage Gap Between Men and Women*, BOS. GLOBE (Sept. 30, 2015), https://www.bostonglobe.com/opinion/2015/09/30/negotiating-gender-wage-gap/Dkukk0XJEishfx5hc3lZML/story.html [https://perma.cc/V42V-UQFU].

[154] *See generally* Laura J. Kray et al., *Battle of the Sexes: Gender Stereotype Confirmation and Reactance in Negotiations*, 80 J. PERSONALITY & SOC. PSYCHOL. 942 (2001), https://www.haas.berkeley.edu/faculty/pdf/Kray_Thompson_Galinsky_JPSP.pdf [https://perma.cc/8J4B-BRM5].

[155] *See id.* at 942.

[156] *Id.* (discussing the importance of negotiation skills in all areas of life).

[157] Noguchi, *supra* note 149.

[158] *See id.*

[159] *See, e.g.*, Mary L. Rigdon, An Experimental Investigation of Gender Differences in Wage Negotiations 2–3, 15 (Oct. 14, 2012) (unpublished paper), http://ssrn.com/abstract=2165253 [https://perma.cc/7B4C-2U6N].

[160] *See, e.g.*, *id.*

prevalent catch phrase is that "women don't ask."[161] And when they do ask, women are often penalized as being too aggressive,[162] despite the fact that men are nine times more likely than women to ask for higher compensation.[163] This aggressiveness, in turn, makes her unconsciously unlikeable and, therefore, less likely to get the promotion and accompanying higher salary.[164] The fear of the repercussions of negotiation lead many women to simply not negotiate.[165]

This creates a catch-22 for many women, as employers often hold those who properly negotiate for higher salaries in high regard.[166] One large-scale study found that men are likely "initiating *four* times as many negotiations as women,"[167] and 20% of women do not negotiate at all.[168] The higher likelihood of men to negotiate combined with employer preference for those who pursue salary negotiations may lead employers to hold men in a higher regard. The effect of this unconscious preference for assertive men and disfavor of assertive women may at first only result in a small salary discrepancy,[169] but over time, that disparity in pay can compound to create a large gap in pay between men and women.[170]

Based on an economic study conducted by Andreas Leibbrandt & John A. List, many of Babcock's findings hold true today.[171] Leibbrandt and List focused primarily on how the parameters provided to job applicants relating to

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[161] *See generally* LINDA BABCOCK & SARA LASCHEVER, WOMEN DON'T ASK (Bantam Books 2007) (2003) (discussing the problems salary negotiations pose for working women).

[162] Paula Gutlove, *Gender Wage Gap Points to Broader Negotiation Disparities*, HUFFINGTON POST, http://www.huffingtonpost.com/paula-gutlove/wage-gap-points-to-broade_b_5228789.html [https://perma.cc/7F2S-DW7U] (last updated June 29, 2014).

[163] Andreas Leibbrandt & John A. List, *Do Women Avoid Salary Negotiations? Evidence from a Large Scale Natural Field Experiment* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 18511, 2012), http://www.nber.org/papers/w18511 [https://perma.cc/UKL4-K7RP].

[164] Gutlove, *supra* note 162.

[165] BABCOCK & LASCHEVER, *supra* note 161, at 94–95.

[166] *See id.* This double-standard that registers female assertiveness as "bitchy" and male assertiveness as commendable limits male behavior as well. *Id.* at 94. Just as women are supposed to be "likeable," men are expected to be aggressive and often are unable to show weakness or vulnerability. *Id.*

[167] *Id.* at 3.

[168] *Id.* at 11.

[169] *Id.* at 8.

[170] *Id.* at 8–9 (describing this phenomenon as "molehills becom[ing] mountains" (citing VIRGINIA VALIAN, WHY SO SLOW? THE ADVANCEMENT OF WOMEN 4–5 (1999))). Sociologists describe this compounding effect as an "accumulation of disadvantage." *Id.* at 9. The term refers to "minor instances" of bias that lead to "major inequalities." *Id.* (quoting VALIAN, *supra*, at 3).

[171] *See* Leibbrandt & List, *supra* note 163, at 1.

negotiation affected the ways in which men and women negotiated.[172] Overall, the study found the wage gap to be more significant in settings in which the parameters for salary negotiations were ambiguous.[173]

The difference in perception of salary negotiations of men and women has been largely attributed to the ways in which gender is socialized.[174] This socialization creates a set of gender norms, which in turn guide the ways in which men's and women's behaviors are perceived as either fitting with, or going against, said norms.[175] These gender expectations create a form of unconscious bias that leads to disfavor of individuals who do not fit within this set of norms, such as disfavoring women who negotiate their salary because women are not supposed to be aggressive.[176]

B. *Negotiation Is Not a Factor Other than Sex*

In order to qualify as a factor other than sex, the practice used to determine wages must be bona fide, meaning it cannot be based on sex.[177] Some circuits additionally require that a factor other than sex must be based in a legitimate business reason, though others allow a factor other than sex to be based on any practice: legitimate or illegitimate.[178] The practice of using negotiations to determine pay is neither bona fide nor serves a legitimate business purpose, and therefore it cannot and should not be considered a factor other than sex as a defense to claims under the Equal Pay Act.

As the court in *Dreves* expressed, basing pay determinations on the gendered practice of salary negotiations perpetuates the continuation of the gender pay gap in the same manner that caused Congress to draft the Equal Pay Act more than fifty years ago.[179] Without a legal remedy for women who are paid less than their male counterparts based on salary negotiations, women are again being economically punished for gender stereotypes in the workplace.

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[172] *See id.* at 2. When the rules of negotiation were explicit, men and women negotiated at a comparable rate; however, when the rules of negotiation are unclear, men negotiate much more frequently than women. *Id.*

[173] *Id.*

[174] BABCOCK & LASCHEVER, *supra* note 161, at 68–122. In the chapters "Nice Girls Don't Ask" and "Scaring the Boys," Babcock and Laschever discuss how certain behaviors and traits are taught and learned from a very young age, thereby creating expectations for the ways in which men and women should behave. *Id.* When an individual does not fit these gender norms, he or she is perceived negatively. *Id.*

[175] *Id.*

[176] *See* MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 203 n.2(b) (8th ed. 2013) (explaining the implications of implicit or unconscious bias).

[177] Washington County v. Gunther, 452 U.S. 161, 170–71 (1981).

[178] Brown, *supra* note 116, at 184–85.

[179] Dreves v. Hudson Grp. (HG) Retail, LLC, No. 2:11-CV-4, 2013 WL 2634429, at *8 (D. Vt. June 12, 2013).

In *Thibodeaux–Woody*, the Fifth Circuit explicitly left open the question of whether or not the use of salary negotiations to determine pay could be considered a factor other than sex.[180] The court applied the bona fide requirement established in *Washington County v. Gunther* and *Hodgson v. Behrens Drug Co.* and determined that the employer's utilization of negotiation to determine salary was not applied evenly between genders and therefore was not bona fide in its application.[181] Under the test the court applied, however, salary negotiations in general would not meet the qualifications to be a bona fide factor other than sex.

Even when salary negotiations are not applied in a blatantly discriminatory fashion as in *Thibodeaux–Woody*, the social science research is clear in its finding: salary negotiations contribute significantly to disparities in pay between men and women.[182] The unconscious bias that creates a difference in perception for women and men who negotiate[183] serves as a form of discriminatory application that is unacceptable under the bona fide requirement.[184] Many employers, such as Reddit discussed above,[185] are aware of the research indicating that women's pay is often disproportionally negatively affected by salary negotiations, due to the widespread coverage of the issue in the media,[186] as well as coverage on job posting sites like Monster.[187] In the face of the extensive research indicating that salary

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[180] Thibodeaux–Woody v. Hous. Cmty. Coll., 593 F. App'x 280, 283–84 (5th Cir. 2014) (deciding the case instead on the ground that the employer's salary negotiations were not offered equally to both genders and therefore the practice was not bona fide).

[181] *Id.* at 284–85 ("If negotiation is not available to persons of both sexes, it cannot be a legitimate, *nondiscriminatory* reason for a pay differential.").

[182] *See supra* Part V.A.

[183] BABCOCK & LASCHEVER, *supra* note 161, at 94–95 (discussing different perceptions of men and women when they participate in salary negotiations); Maria Konnikova, *Lean Out: The Dangers for Women Who Negotiate*, NEW YORKER (June 10, 2014), http://www.newyorker.com/science/maria-konnikova/lean-out-the-dangers-for-women-who-negotiate [https://perma.cc/88N3-PWTQ] (detailing the economic dangers posed for women who attempt to negotiate their salaries).

[184] *Dreves*, 2013 WL 2634429, at *8.

[185] *See supra* Part V.A.

[186] *See generally* Editorial, *supra* note 153; Gutlove, *supra* note 162; Katie Johnston, *Bill Aims to Close the Gender Wage Gap*, BOS. GLOBE (Feb. 23, 2015), https://www.bostonglobe.com/business/2015/02/22/bill-aims-close-gender-wage-gap/eAX5j5HxHZU9h14orWLXJJ/story.html [https://perma.cc/X4J3-UM36]; Konnikova, *supra* note 183; Laura J. Kray, *The Best Way to Eliminate the Gender Pay Gap? Ban Salary Negotiations.*, WASH. POST (May 21, 2015), https://www.washingtonpost.com/posteverything/wp/2015/05/21/the-best-way-to-way-to-eliminate-the-gender-pay-gap-ban-salary-negotiations/?utm_term=.49bd4b714c0e [https://perma.cc/HG62-87QM]; Noguchi, *supra* note 149.

[187] *See* Christina Lopez, *How Salary Negotiation Contributes to the Wage Gap*, MONSTER, http://www.monster.com/career-advice/article/Salary-Negotiation-Gender-Wage-Gap [https://perma.cc/2URY-PGTW].

negotiations contribute to the continuing existence of the wage gap, companies still continue to use negotiations as a means to determine salary.[188]

C. *Previous Unsuccessful Solutions*

There have been many attempts to reenergize both federal and state Equal Pay Act legislation in order to provide for the remedies Congress intended.[189] Two of the most prominent attempts have been in the California legislature and the federal Congress.[190] Congress has tried many times to amend the Federal Equal Pay Act with the Paycheck Fairness Act but has thus far been unsuccessful in passing the amendment.[191] In 2015, California passed what is considered to be the "strictest" equal pay legislation in the United States.[192] Though both pieces of legislation make strides towards addressing the problems posed by equal pay legislation in eliminating the pay gap, minor textual changes could significantly increase the likelihood that the legislation would prohibit employers from successfully asserting salary negotiation as a factor other than sex.

1. *The Paycheck Fairness Act*

The Paycheck Fairness Act, as introduced many times in Congress, would require business necessity for the "factor other than sex" defense and create a grant program to improve salary negotiation skills for women, among proposing other changes to the Equal Pay Act.[193] The Paycheck Fairness Act, as it has been previously introduced, is insufficient to properly address the issues that face the courts when applying the "factor other than sex" defense to negotiations. The Paycheck Fairness Act focuses primarily on the application of the "factor other than sex" defense to "legitimate business purpose[s]" such

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[188] *See* Kray, *supra* note 186; *see also supra* Part V.A.

[189] *See* Laura Bassett, *Paycheck Fairness Act Blocked Again by Senate GOP*, HUFFINGTON POST (Sept. 15, 2014), http://www.huffingtonpost.com/2014/09/15/paycheck-fairness-act_n_5825644.html [https://perma.cc/2J4M-WYKY]; *see also* Jackie Borchardt, *Democratic Ohio Lawmakers Introduce 'Equal Pay' Bill*, CLEVELAND.COM (Sept. 23, 2015), http://www.cleveland.com/open/index.ssf/2015/09/democratic_ohio_lawmakers_intr.html [https://perma.cc/N54J-7NHL]; Johnston, *supra* note 186; Bourree Lam, *The U.S.'s 'Strictest' Equal-Pay Law Is About to Go into Effect*, ATLANTIC (Dec. 31, 2015), http://www.theatlantic.com/business/archive/2015/12/california-fair-pay-2016/422292/ [https://perma.cc/3WXB-VXF2]; Jill L. Rosenberg, *New York State Expands Equal Pay Law and Other Workplace Protections for Women*, ORRICK EMP. L. & LITIG. BLOG (Oct. 26, 2015), http://blogs.orrick.com/employment/2015/10/26/new-york-state-expands-equal-pay-law-and-other-workplace-protections-for-women/ [https://perma.cc/C5XJ-VVYG].

[190] Elzer, *supra* note 12, at 30 (advocating for the passage of the Paycheck Fairness Act); Lam, *supra* note 189 (discussing the implications of California's state legislation).

[191] Bassett, *supra* note 189 (discussing the federal Paycheck Fairness Act).

[192] Lam, *supra* note 189.

[193] *See generally* Paycheck Fairness Act, H.R. 1619, 114th Cong. (2015).

as market forces, prior salary, qualifications, and experience, even if unrelated to the specific position.[194] Negotiation presents different challenges than "market forces" or prior salary, as it is an independent process and necessitates a specific provision to address the issue.[195]

When it was last formally introduced in Congress, the text of the bill proposed that the factor other than sex must be bona fide, but it also included a provision on business necessity.[196] Though the legislation required a factor other than sex to be bona fide, no court has held that negotiation is not a bona fide factor other than sex when evenly relied upon for both sexes.[197] As such, this protection does not solve the current problem in the courts until judges begin to apply the bona fide requirement when negotiation is being offered as a legitimate factor other than sex.

The Paycheck Fairness Act also has a "business necessity" requirement.[198] An employer could argue that salary negotiations are the most effective and common way to determine pay and therefore serve a business necessity.[199] As salary negotiations are not sex-based on their face,[200] this business necessity requirement could lead courts to continue to allow negotiation to be considered a factor other than sex.

The best case for ruling out negotiation as a factor other than sex under the Paycheck Fairness Act is that salary negotiation is often not "job-related."[201] Especially for fields in which negotiation is not a facet of the job itself, it is not sufficiently job-related to justify allowing salary negotiations to qualify as a factor other than sex.[202] However, given the courts' narrowing of the Equal Pay Act,[203] the deference to employer practices will probably allow the practice to continue under the language of the Paycheck Fairness Act.

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194 NAT'L WOMEN'S LAW CTR., CLOSING THE "FACTOR OTHER THAN SEX" LOOPHOLE IN THE EQUAL PAY ACT (Apr. 2011), http://www.nwlc.org/sites/default/files/pdfs/4.11.11_factor_other_than_sex_fact_sheet_update.pdf [https://perma.cc/RKQ8-GRZF].

195 *See* Eisenberg, *supra* note 63, at 819.

196 H.R. 1619 § 3(a)(3) ("The bona fide factor defense described in subparagraph (A)(iv) shall apply only if the employer demonstrates that such factor (i) is not based upon or derived from a sex-based differential in compensation; (ii) is job-related with respect to the position in question; (iii) is consistent with business necessity; and (iv) accounts for the entire differential in compensation at issue. Such defense shall not apply where the employee demonstrates that an alternative employment practice exists that would serve the same business purpose without producing such differential and that the employer has refused to adopt such alternative practice.").

197 *See supra* Part IV.C.

198 H.R. 1619 § 3(a)(3).

199 *See id.*

200 *See supra* Part IV.C.

201 *See* H.R. 1619 § 3(a)(3) ("The bona fide factor defense described in subparagraph (A)(iv) shall apply only if the employer demonstrates that such factor . . . is job-related with respect to the position in question . . . .").

202 Elzer, *supra* note 12, at 32.

203 *See supra* Part IV.C.

An aspect of the Paycheck Fairness Act that should be retained in any subsequent attempts to amend the Equal Pay Act, which does not fully foreclose the possibility of salary negotiations as a means to determine pay, is the authorization of grants to provide negotiation skills training for women and girls.[204] Especially in the Paycheck Fairness Act, which may leave negotiation as a viable means to determine pay for employers, this training for women and girls in how to effectively negotiate plays an important role in reaching equality in pay between women and men.[205] Providing funding for employers to limit the discriminatory effect in their negotiation policies would also aid in determining whether or not employers have made an "honest effort" to base pay on a factor other than sex.[206] The existence of this provision, however, may lead courts to assume that salary negotiations are still acceptable, as the legislation provides for a means by which to train women and girls to become better at negotiation. This implies that there will be a need for strong negotiation skills and therefore that salary negotiations will not be excluded under the present legislation.

2. *California's Legislation*

In October of 2015, the California legislature, with approval from the Governor, amended its version of the Equal Pay Act to attempt to remedy some of the issues presented by the "factor other than sex" defense.[207] California's legislation was similar to the proposed Paycheck Fairness Act but included some key phrasing differences, primarily a definition of "business necessity."[208]

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[204] *See* H.R. 1619 § 5(a)(2) ("In carrying out the program, the Secretary of Labor may make grants on a competitive basis to eligible entities, to carry out negotiation skills training programs for girls and women. "); *id.* § 5(a)(5) ("An entity that receives a grant under this subsection shall use the funds made available through the grant to carry out an effective negotiation skills training program that empowers girls and women. The training provided through the program shall help girls and women strengthen their negotiation skills to allow the girls and women to obtain higher salaries and rates of compensation that are equal to those paid to similarly situated male employees.").

[205] *See* Elzer, *supra* note 12, at 33.

[206] *See* Hodgson v. Behrens Drug Co., 475 F.2d 1041, 1047–48 (5th Cir. 1973).

[207] *See generally* S.B. 358, 2015 Leg., Reg. Sess. (Cal. 2015) (codified as amended at CAL. LAB. CODE § 1197.5 (West Supp. 2017)).

[208] *See id.* § 2(a) ("An employer shall not pay any of its employees at wage rates less than the rates paid to employees of the opposite sex for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions, except where the employer demonstrates: (1) The wage differential is based upon one or more of the following factors: . . . (D) A bona fide factor other than sex, such as education, training, or experience. This factor shall apply only if the employer demonstrates that the factor is not based on or derived from a sex-based differential in compensation, is job related with respect to the position in question, and is consistent with a business necessity. For purposes of this subparagraph, 'business necessity' means an overriding legitimate business purpose such that the factor relied upon effectively fulfills

Although California's legislation provides more thorough protection for employees than the federally proposed Paycheck Fairness Act, it still poses potential difficulties when it comes to the treatment of negotiation as a factor other than sex. As the California legislation is based largely on the Paycheck Fairness Act,[209] many of the deficiencies described above also create potential obstacles for plaintiffs who seek to hold their employers liable for pay disparities created by the use of salary negotiations.[210]

The addition of a definition of "business necessity" limits some of the concerns addressed above; it does not assure that negotiation cannot serve a "legitimate business purpose." As the use of salary negotiations is so widespread,[211] courts will be slow to find that legislation has forbidden employers from using it as a means to determine pay. Additionally, salary negotiation often "fulfills" the purpose it is intended to serve: rewarding good negotiators and penalizing those who are less effective.[212] As such, whether or not salary negotiations are a valid factor other than sex will turn on whether or not they serve an "overriding legitimate business purpose."[213] Given the courts' unwillingness to hold that negotiation is not a factor other than sex, it is likely that salary negotiations will be considered to meet this requirement.

Notably, the California legislation does not include a grant provision for negotiation training programs for women and girls.[214] This may be the result of a number of factors, ranging from the difference in the monetary capabilities of state and federal budgets to the desire to eliminate salary negotiations as a factor other than sex. If the absence of the grant provision is due to a lack of state budgetary funds, the need for a federal amendment to the Equal Pay Act becomes more significant, even if the amendment does not sufficiently foreclose the possibility that salary negotiations may be used to determine pay.

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the business purpose it is supposed to serve. This defense shall not apply if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential. (2) Each factor relied upon is applied reasonably. (3) The one or more factors relied upon account for the entire wage differential.").

[209] Gary R. Siniscalco, *As Calif. Goes on Equal Pay, So Goes the Nation?*, LAW360 (Sept. 10, 2015), http://www.law360.com/articles/699503/as-calif-goes-on-equal-pay-so-goes-the-nation [https://perma.cc/48QC-5PA3].

[210] *See supra* Part V.C.1.

[211] *See supra* Part V.A.

[212] Kray et al., *supra* note 154, at 942.

[213] Cal. S.B. 358.

[214] *See id.*

D. *An Amendment to the Equal Pay Act Is Necessary to Provide a Legitimate Legal Remedy for Those Harmed by the Gendered Biases Present in Negotiation*

Given the insufficiencies with both the Paycheck Fairness Act and California's legislation,[215] slight changes would be necessary in order to draft legislation that would assure negotiation could not be considered a factor other than sex.

1. *Proposed Legislation*

As California's legislation comes the closest to providing what is necessary in order to assure that the practice of negotiations as a means to determine pay is not an acceptable factor other than sex, it serves as the best model for drafting legislation to sufficiently address the problem. The text of California's legislation is shown below in roman type with changes indicated in italics.

> (D) A bona fide factor other than sex, such as education, training, or experience. This factor shall apply only if the employer demonstrates that the factor is not based on or derived from a sex-based differential in compensation *or an employment practice proven to have a disproportionately negative effect on the wage of members of a certain gender*, is job related with respect to the position in question, and is consistent with a business necessity. For purposes of this subparagraph, "business necessity" means an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve. This defense shall not apply if the employee demonstrates that an alternative business practice exists that would serve the same business purpose *while significantly minimizing or* without producing the wage differential.
>
> (2) Each factor relied upon is applied reasonably.
>
> (3) The one or more factors relied upon account for the entire wage differential.[216]

In selecting language for the statute, it is necessary to avoid using the phrase disparate impact.[217] Although it is likely that salary negotiations may indeed have a disparate impact on women, the phrase is fraught with its own legal framework and a heated dispute as to whether or not disparate impact

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[215] *See supra* Part V.C.1–.2.

[216] This proposed legislation is largely based on California's legislation passed in October 2015: S.B. 358. *See* Cal. S.B. 358; *see also* Part V.C.2.

[217] *See generally* Griggs v. Duke Power Co., 401 U.S. 424 (1971). *Griggs* established the concept of "disparate impact" under Title VII of the Civil Rights Act. Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 FLA. L. REV. 251, 256–57 (2011).

should be a basis for recovery.[218] Additionally, disparate impact claims are not cognizable under the Equal Pay Act.[219] Regardless of the state of disparate impact under the Equal Pay Act, salary negotiations constitute a form of disparate treatment rather than disparate impact, as the use of negotiation to determine pay is not a neutral policy as required under the disparate impact framework.[220] As discussed above, the discriminatory effect of salary negotiations is the result of unconscious bias, which is not neutral in nature.[221] This type of unconscious or implicit bias[222] fits under the Equal Pay Act's pay discrimination scheme rather than a disparate impact framework, as the Equal Pay Act does not require explicit proof of intent to discriminate.[223] Because the use of salary negotiations to determine pay inherently involves gender bias,[224] the policy is not neutral, as would be required under a disparate impact scheme.[225] As such, it is both necessary and appropriate to avoid the term disparate impact in proposed amendments to the Equal Pay Act.

Though there are potential ways in which a plaintiff may prove that alternative employment practices are available to an employer who asserts the "factor other than sex" defense,[226] requiring a plaintiff to prove that a wage

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[218] *See* Carle, *supra* note 217, at 253–55, 257–60.

[219] Wernsing v. Dep't of Human Servs., 427 F.3d 466, 469 (7th Cir. 2005) ("An analogy to disparate-impact litigation under Title VII does not justify a 'business reason' requirement under the Equal Pay Act, however, because the Equal Pay Act deals exclusively with disparate treatment. It does not have a disparate-impact component.").

[220] *See Griggs*, 401 U.S. at 431 (discussing practices that are neutral on their face but have a discriminatory effect). *See generally* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (plurality opinion) (discussing sex stereotypes and unconscious stereotyping).

[221] *See supra* Part V.A.

[222] Thomas v. Eastman Kodak Co., 183 F.3d 38, 58 (1st Cir. 1999) ("The ultimate question is whether the employee has been treated disparately 'because of race.' This is so regardless of whether the employer consciously intended to base the evaluations on race, or simply did so because of unthinking stereotypes or bias."); *see also* Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 746 (2005) (addressing the influence of unconscious bias in employment-related decisionmaking); Audrey J. Lee, Note, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481, 488–90 (2005) (discussing unconscious bias theory in the courts).

[223] Beck–Wilson v. Principi, 441 F.3d 353, 360 (6th Cir. 2006); *see also Price Waterhouse*, 490 U.S. at 242 (citing *Griggs*, 401 U.S. 424).

[224] *See supra* Part V.A.

[225] The proposed amendment does not alter a plaintiff's burden to prove her prima facie case of pay discrimination. *See supra* Part III.B (discussing the prima facie Equal Pay Act case). However, this proposed amendment permits plaintiffs to rebut a defendant's affirmative defense with evidence of the gendered effects of salary negotiations.

[226] *See, e.g.*, Elzer, *supra* note 12, at 32–33 ("A plaintiff might be able to meet this burden by devising a method of demonstrating negotiation skills outside of the salary context. For example, during the plaintiff's initial job interview, the employer could conduct a mock negotiation session that mimics the prospective job's actual duties. Alternatively, the employer could observe the plaintiff during an actual negotiation session or could ask the negotiation partner to evaluate the plaintiff's negotiation skills.").

differential would not exist at all under this alternative practice is a difficult standard to meet once an employer has proven that salary negotiation is related to the job. Including the "significantly minimizing" language gives plaintiffs more leeway while still requiring that the alternative practice is one that would have a substantial impact on pay rather than only having a minimal effect.

2. *Consistent with Congress's Intent in Passing the Equal Pay Act*

Congress's intent in passing the Equal Pay Act was to further the rights of women in the workplace and eradicate the pay disparity between men and women.[227] This proposed legislation addresses one of the most significant barriers women face in achieving equal pay: salary negotiations.[228] As such, eliminating salary negotiations as a means by which plaintiffs are denied relief under the Equal Pay Act would further the intentions of Congress in passing the Equal Pay Act more than fifty years ago.[229]

Congress affirmed its goal of eliminating the pay gap in 2009 when it enacted the Lilly Ledbetter Fair Pay Act as an amendment to Title VII.[230] This was the first legislation signed by President Barack Obama.[231] On the seventh anniversary of the Lilly Ledbetter Fair Pay Act, President Obama announced an executive action requiring companies of 100 or more employees to report pay information to the EEOC, and the President called upon Congress to pass the Paycheck Fairness Act.[232] Following President Obama's renewed call to Congress to pass the Paycheck Fairness Act, the Administration described the Act as "commonsense legislation" that would provide women with "tools to fight pay discrimination."[233] The President also referred to the legislation passed in California aimed at achieving this goal.[234] The desire to fight pay discrimination expressed by the Obama Administration is the same that motivated Congress to pass the Equal Pay Act, the Bennett Amendment, and the Lilly Ledbetter Fair Pay Act: pay equality between men and women. The legislation proposed above furthers that same goal.

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[227] *See* Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974); *see also* Shultz v. Wheaton Glass Co., 421 F.2d 259, 264 (3d Cir. 1970).

[228] *See supra* Part V.A (discussing the widespread use of salary negotiations to determine employees' pay).

[229] *See* H.R. REP. NO. 88-309 (1963); *see also* S. REP. NO. 88-176 (1963).

[230] *See infra* note 236 and accompanying text (discussing the passage of the Lilly Ledbetter Fair Pay Act).

[231] Press Release, Office of the Press Sec'y, White House, FACT SHEET: New Steps to Advance Equal Pay on the Seventh Anniversary of the Lilly Ledbetter Fair Pay Act (Jan. 29, 2016), https://www.whitehouse.gov/the-press-office/2016/01/29/fact-sheet-new-steps-advance-equal-pay-seventh-anniversary-lilly [https://perma.cc/U2QW-JZ3T].

[232] Bourree Lam, *Obama's New Equal-Pay Rules*, ATLANTIC (Jan. 29, 2016), http://www.theatlantic.com/business/archive/2016/01/eeoc-pay-discrimination-obama/433926/ [https://perma.cc/R2ST-KYSU].

[233] Press Release, Office of the Press Sec'y, *supra* note 231.

[234] *Id.*

3. *Its Intended Effect*

The legislation is intended to provide a remedy for women who receive lesser pay than their male counterparts based on their employers' reliance on a means of determining pay that has proven to harm women's overall wages.[235]

This would not be the first time an amendment has been utilized to fix a shortcoming within a pay discrimination statute. In addition to the Bennett Amendment to Title VII, the Lilly Ledbetter Fair Pay Act of 2009 was enacted as a "legislative fix" to resolve issues with the statutory limits imposed on pay discrimination claims under Title VII.[236] This legislative solution to an interpretation issue within the courts was an effective means to assure that an antidiscrimination statute was being enforced in line with its purpose and not being narrowed by the courts' interpretation.[237]

Although the legislation drafted above is broader than both the Paycheck Fairness Act and the California legislation,[238] it does not infringe upon employers' use of bona fide factors other than sex to determine pay.[239] The language critical to the exclusion of salary negotiations is "an employment practice proven to have a disproportionately negative effect on the wage of members of a certain gender."[240] The requirement that the practice can be proven to have a disproportionate effect limits the employment practices that may be considered. As the use of salary negotiations has significant social science data[241] to support the effect of the practice on women, it would meet this proof standard; however, it is unlikely that other practices commonly used to determine pay, such as education, experience, performance reviews, etc., could rise to this level of evidence of a disproportionate effect on women's pay. Additionally, with the passage of broader legislation, employers will adapt their practices to avoid liability under an expanded statute. This requirement of proof encourages employers to be diligent in choosing their means of determining pay and research their practices before implementing them.

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[235] *See supra* Part V.A (discussing the connection between reliance on salary negotiations and the gender pay gap).

[236] *Lilly Ledbetter Fair Pay Act*, NAT'L WOMEN'S L. CTR. (Jan. 29, 2013), http://nwlc.org/resources/lilly-ledbetter-fair-pay-act/ [https://perma.cc/JM3P-6LSJ]. The Lilly Ledbetter Fair Pay Act was passed following a Supreme Court decision for an employer that was counter to the goals of Title VII. *Id.*

[237] *Id.*

[238] *See supra* Part V.C.1–.2.

[239] *See supra* Part V.D.1.

[240] *See supra* Part V.D.1.

[241] *See supra* Part V.A.

VI. CONCLUSION

The use of salary negotiations by employers to determine pay and to justify a discrepancy in pay between their male and female employees should not qualify as a bona fide factor other than sex under the Equal Pay Act. Allowing employers to skirt liability in this fashion is both inconsistent with Congress's intent in passing the Equal Pay Act and perpetuates the continuation of the gender pay gap in America. If Congress's hope of eradicating the gender pay gap is to be realized, employers cannot continue to be allowed to negotiate around the Equal Pay Act's protection.

An amendment to the Equal Pay Act would not only aid in providing the legal recourse promised by the Act, but would also play a critical role in shaping the American workplace. A person's pay is critical to her perception of her worth as an employee. If employers are pushed to develop pay policies that level the playing field between men and women, not only would the American workforce come closer to achieving pay equality, but women would be shown that their value is equal to that of their male counterparts, thus empowering women to work towards their fullest potential. Eliminating salary negotiations as a factor other than sex is a step towards realizing the Equal Pay Act's purpose: equal pay for equal work.[242] After more than fifty years, it is time to get more than only 79% of the way there.

[242] Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974) ("Congress' purpose in enacting the Equal Pay Act was to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry . . . .").